

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

September 12, 2002

IN RE:

COMPLAINT OF US LEC OF TENNESSEE,  
INC. AGAINST ELECTRIC POWER BOARD  
OF CHATTANOOGA

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DOCKET NO.  
02-00562

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ORDER DENYING MOTION TO DISMISS AND CONVENING A CONTESTED CASE

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This matter is before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority" or "TRA") upon the *Motion in Opposition to Commencement of a Contested Case or Motion to Dismiss* (the "*Motion to Dismiss*") filed by the Electric Power Board of Chattanooga ("EPB"). For the reasons stated below, the Hearing Officer denies EPB's *Motion to Dismiss*.

**US LEC's Complaint**

On May 15, 2002, US LEC of Tennessee, Inc. ("US LEC") filed a *Complaint* against EPB alleging discriminatory and anticompetitive practices on the part of EPB. According to the *Complaint*, US LEC is a competing local exchange carrier authorized to operate throughout the service area of BellSouth Telecommunications, Inc. in Tennessee, including Chattanooga.<sup>1</sup> EPB is a municipal electric service and a board of the City of Chattanooga which provides retail electric service to business and residential customers in the City of Chattanooga, most of Hamilton County, and parts of eight other counties located in Tennessee and Georgia.<sup>2</sup> By Order dated May 10, 1999, in Docket No. 97-07488, the Authority granted EPB a certificate of public

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<sup>1</sup> *Complaint*, May 15, 2002, p. 1.

<sup>2</sup> *Id.*, pp. 1-2.

convenience and necessity ("CCN") for the provision of telecommunication services.<sup>3</sup> EPB currently provides such services in Chattanooga, under the name "EPB Telecommunications," in competition with US LEC and other local exchange carriers.<sup>4</sup>

EPB filed its *Motion to Dismiss* on June 10, 2002, along with the Affidavits of Harold E. Depriest and Stephen W. Lawrence. EPB states that US LEC's *Complaint* is without merit, its contentions are patently unfounded, there is no basis for opening a contested case and that the TRA should dismiss US LEC's *Complaint*.<sup>5</sup> At a regularly scheduled Authority Conference held on June 11, 2002, the Directors appointed the General Counsel or his designee as Hearing Officer to (1) make findings of fact and conclusions of law, as necessary; (2) determine whether to open a contested case; and (3) if a contested case is opened, render an initial decision on the merits of the *Complaint*.<sup>6</sup> On June 18, 2002, US LEC filed a *Response to Motion to Dismiss* (the "Response").

In its *Complaint*, US LEC alleges discriminatory and anti-competitive practices against EPB, relying on Tenn. Code Ann. §§ 65-4-117(1) and 65-5-208(c) and Authority Rule 1220-4-8-.09(b).<sup>7</sup> US LEC states that under the Authority's May 10, 1999 Order in Docket No. 97-07488, EPB is required to comply with certain terms and conditions which were designed to prevent EPB's electric division of EPB from cross-subsidizing, directly or indirectly, EPB's telecommunications division.<sup>8</sup> Those conditions are contained in the "Second Revised Proposed Conditions" filed with the Authority on November 3, 1998 in Docket No. 97-07488 and referred to in a footnote in the Authority's May 10, 1999 Order in that docket.<sup>9</sup> US LEC's *Complaint*

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<sup>3</sup> *Id.*, p. 2.

<sup>4</sup> *Id.*, pp. 3-4.

<sup>5</sup> *Motion to Dismiss*, June 10, 2002, p. 2.

<sup>6</sup> Transcript of Authority Conference, June 11, 2002, pp. 32-33.

<sup>7</sup> *Complaint*, May 15, 2002, p. 1.

<sup>8</sup> *Id.*, p. 2.

<sup>9</sup> *Id.*, p. 2. See *Order Approving Application for Certificate of Public Convenience and Necessity*, Docket No. 97-07488 (May 10, 1999), p. 5, n. 2.

relies in part on these “Proposed Conditions,” which US LEC states include a Code of Conduct that requires the following: (a) “EPB may not discriminate between the telecommunications division”<sup>10</sup> and other telecommunications providers, (b) the electric and telecommunications divisions of EPB may engage in a limited amount of joint marketing “provided that the customer is informed . . . of the separate identities of each,”<sup>11</sup> and (c) internal auditors at EPB are required to test “the compliance of the telecommunications division and the electric system” with the Code of Conduct and the other Proposed Conditions and to “issue a statement detailing the EPB’s compliance with the Code of Conduct.”<sup>12</sup>

US LEC alleges that EPB’s Electric Division allows EPB Telecommunications Division to gain access to buildings by using rights-of-way and building entrance facilities which are under the control of the Electric Division.<sup>13</sup> US LEC states that access to these same facilities and rights-of-way are denied to other telecommunications carriers.<sup>14</sup> US LEC further states that other telecommunications carriers may be required to pay an access fee to gain entrance to facilities; however, EPB, as a sole provider of electric service in Chattanooga, already has access to all buildings and pays no fees.<sup>15</sup> US LEC avers that this creates discrimination in favor of EPB’s telecommunications operations over the other carriers which violates the “Code of Conduct” and is an illegal subsidization of EPB’s telecommunications operations in violation of Tenn. Code Ann. § 7-52-402.<sup>16</sup>

US LEC states that EPB “intentionally presents its electric and telephone operations as intertwined” and this “not only violates the TRA’s Proposed Conditions but violates the statutory

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<sup>10</sup> *Second Revised Proposed Conditions to Certificate of Public Convenience and Necessity to Ensure Statutory Compliance Filed on Behalf of the Tennessee Cable Telecommunications Association and Electric Power Board of Chattanooga*, Docket No. 97-07488, November 3, 1998, p. 17.

<sup>11</sup> *Id.* p. 16.

<sup>12</sup> *Id.* p. 19. *See Complaint*, May 15, 2002, pp. 2-3.

<sup>13</sup> *Complaint*, May 15, 2002, p. 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Response*, June 18, 2002, p. 3.

<sup>16</sup> *Complaint*, May 15, 2002, p. 4.

prohibition against cross-subsidization by giving EPB Telecom the free use of the good will and reputation of EPB.”<sup>17</sup> Finally, US LEC alleges that EPB’s failure to file internal audit reports with the Authority constitutes a violation of the Order issued in granting the CCN.<sup>18</sup>

US LEC asks the Authority to open an investigation concerning the practices of EPB and its telecommunications division, convene a contested case, impose sanctions for any violation of the May 15, 1999 Order and of state law, promulgate additional terms and conditions to prevent further discrimination and cross-subsidization, direct the telecommunications division of EPB to operate under a different name having no reference to EPB, and grant US LEC such other relief as may be warranted by the evidence and applicable law.<sup>19</sup>

### **EPB’s Motion to Dismiss**

In its *Motion to Dismiss*, EPB requests that the Authority decline to convene a contested case or, in the alternative, dismiss US LEC’s *Complaint*.<sup>20</sup> EPB states that “EPB Telecommunications” is an appropriate name for EPB’s telecommunications division, that EPB Telecommunications is part of the same legal entity as EPB, and this organizational structure is provided by the 1997 legislation that authorized EPB to initiate its telecommunications project.<sup>21</sup>

EPB further states that it has not denied access to its underground facilities and has submitted the Affidavit of Stephen W. Lawrence, Vice President of the Engineering Division of the Electric Power Board of Chattanooga, in which Mr. Lawrence states that the allegations have been investigated and EPB has not received any third party requests for access to underground facilities since EPB Telecommunications received its CCN.<sup>22</sup>

Finally, EPB states that its internal auditors have issued internal audit reports, but EPB is

<sup>17</sup> *Response*, June 18, 2002, p. 2.

<sup>18</sup> *Complaint*, May 15, 2002, p. 4.

<sup>19</sup> *Id.*, p. 5.

<sup>20</sup> *Motion to Dismiss*, June 10, 2002, p. 1.

<sup>21</sup> *Id.*, p. 2.

<sup>22</sup> Affidavit of Stephen W. Lawrence, June 10, 2002, p. 1.

not required automatically to file those reports with the Authority.<sup>23</sup> EPB has submitted the Affidavit of Harold E. DePriest, President of EPB, which states that Mr. DePriest has received the reports documenting the results of an internal audit of EPB in compliance with the Proposed Conditions referred to in the Authority's May 10, 1999 Order in Docket No. 97-07488<sup>24</sup>

### **Pre-Hearing Conference**

On September 4, 2002, a Pre-Hearing Conference was held at which the following parties were in attendance:

US LEC of Tennessee, Inc. – **Henry Walker, Esq.**; Boulton, Cummings, Connors & Berry, PLC, 414 Union Street, Suite 1600, Nashville, Tennessee 37219 (by telephone)

Electric Power Board of Chattanooga – **Mark W. Smith, Esq.**; Strang, Fletcher, Carriger, Walker, Hodge, & Smith, PLLC, 400 Krystal Building, One Union Square, Chattanooga, Tennessee 37402 (by telephone)

At the Pre-Hearing Conference, the parties presented oral argument on EPB's *Motion to Dismiss*. Counsel for EPB contended that EPB's submission of affidavits in support of its *Motion to Dismiss* converts this motion to a motion for summary judgment.<sup>25</sup> Counsel further contended that no genuine issue of material fact exists and, therefore, summary judgment should be granted in favor of EPB.<sup>26</sup> Counsel for US LEC countered that a motion for summary judgment would be proper only after the parties have had an opportunity to conduct discovery.<sup>27</sup>

### **Findings and Conclusions**

EPB's *Motion to Dismiss* is made pursuant to Authority Rules 1220-1-2-.02 and 1220-1-2-.03.<sup>28</sup> Rule 1220-1-2-.02(2) provides:

The Authority may commence a contested case upon the initial petition of any person, unless:

<sup>23</sup> *Motion to Dismiss*, June 10, 2002, p. 3.

<sup>24</sup> Affidavit of Harold E. DePriest, June 10, 2002.

<sup>25</sup> Transcript of Proceedings, September 4, 2002, pp. 3-4.

<sup>26</sup> *Id.*, p. 4.

<sup>27</sup> *Id.*, p. 16.

<sup>28</sup> *Motion to Dismiss*, June 10, 2002, p. 1.

- (a) the Authority lacks jurisdiction of the subject matter;
- (b) as a matter of law, no hearing is required for the disposition of the matter;
- (c) the relief which the petition seeks is on its face barred as a matter of law;
- (d) the initial petition was not submitted in a form substantially complying with any applicable provisions of law; or
- (e) the initial petition was not accompanied by the appropriate fees.

Rule 1220-1-2-.03(2) provides:

Every defense, in law or fact, to an order or notice commencing a contested case or to an initial petition, shall be asserted in an answer, except that the following defenses may, at the option of the respondent, be made by motion in writing:

- (a) lack of jurisdiction over the subject matter;
- (b) lack of jurisdiction over the person;
- (c) insufficiency of notice;
- (d) insufficiency of service of the order, notice or petition;
- (e) failure to state a claim upon which relief can be granted; or
- (f) failure to join an indispensable party.

These rules of the Authority obviously correlate to Rule 12 of the Tennessee Rules of Civil Procedure. Tenn. R. Civ. P. 12.02 allows a party to plead the defenses listed above. At a minimum, the Tennessee Rules of Civil Procedure offer guidance to the Authority in the conduct of contested cases. Tenn. R. Civ. P. 12.02 provides, in part:

If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Tenn. R. Civ. P. 12.03 provides, in part:

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Summary judgment is an appropriate method of resolving issues in administrative proceedings, and the standard for determining whether summary judgment should be granted generally follows the standard applied in the courts.<sup>29</sup> Although the Authority's Rules do not refer to summary judgment as such, the Authority's Rules clearly allow for summary judgment. Authority Rule 1220-1-2-.22 states:

General Procedural Powers.

In any contested case the Authority or the Hearing Officer:

- (1) may determine that there is no genuine issue as to any material fact. In reaching such determination, the Authority or Hearing Officer may, in its discretion, hear and determine all or any part of a case, without hearing oral testimony;
- (2) may, on its own motion or the motion of any party, allow amendments, consolidate cases, join parties, sever aspects of the case for separate hearings, permit additional claims or contentions to be asserted, bifurcate or otherwise order the course of proceedings in order to further the just, efficient and economical disposition of cases consistent with the statutory policies governing the Authority; and
- (3) shall afford all parties an opportunity to be heard after reasonable notice before exercising these general procedural powers.

It is reasonable for the Authority to approach a motion for summary judgment much as a court would do. The Authority could appropriately apply the same standard a court would apply in deciding whether such a motion should be granted. Applying the procedures set forth in the Tennessee Rules of Civil Procedure, and notwithstanding the affidavits submitted by EPB, the Hearing Officer determines that EPB's *Motion to Dismiss* should not be treated as a motion for summary judgment.

At this preliminary stage of the case, it is the Hearing Officer's duty, pursuant to the Authority's directives stated at the June 11, 2002 Authority Conference, to rule on EPB's *Motion to Dismiss* and determine whether a contested case should be convened. US LEC has responded

<sup>29</sup> See e.g. *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996); *Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency*, 35 F.3d 600, 605-06 (1st Cir. 1994); *Contini v. Board of Education of Newark*, 668 A.2d 434, 441-42 (N.J. App. 1995); *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 405 N.E.2d 151, 156-57 (Mass. App. 1980).

to EPB's *Motion to Dismiss*, but only as a motion to dismiss. US LEC has not responded in the context of a motion for summary judgment. Further, it is questionable whether EPB's affidavits are sufficient to convert its motion to dismiss to a motion for summary judgment. These affidavits largely consist of blanket assertions by the affiants in denial of US LEC's claims. Parts, if not all, of the affidavits could be viewed as nothing more than verified answers to the *Complaint*. Other statements in the affidavits raise more questions than they answer.

The Hearing Officer also finds that several legal questions have been raised that need to be addressed by the parties. These issues include, but are not necessarily limited to, the interpretation and applicability of the May 10, 1999 Order and the Proposed Conditions in Docket No. 97-07488, and the full implications of Tenn. Code Ann. §§ 7-52-401 and 7-52-402. The Hearing Officer concludes, therefore, that EPB's motion for summary judgment shall be held in abeyance. EPB may renew and, if desired, supplement its motion. If EPB elects to do so, both parties should then file briefs addressing all legal issues and submit any supporting affidavits they deem necessary.

When a complaint is challenged by a motion to dismiss under Tenn. R. Civ. P. 12.02(6), and by implication under Authority Rule 1220-1-2-.03(2), the reviewing court must take all the well-pleaded, material factual allegations as true and construe the complaint liberally in the plaintiff's favor.<sup>30</sup> The Tennessee Court of Appeals has stated:

The sole purpose of a Tenn.R.Civ.P. 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint. *Sanders v. Vinson*, 558 S.W.2d 838, 840 (Tenn. 1977); *Holloway v. Putnam County*, 534 S.W.2d 292, 296 (Tenn. 1976). These motions are not favored, *see Moore v. Bell*, 187 Tenn. 366, 369, 215 S.W.2d 787, 789 (1948), and are now rarely granted in light of the liberal pleading standards in the Tennessee Rules of Civil Procedure. *See Barish v. Metropolitan Gov't*, 627 S.W.2d 953, 954 (Tenn.Ct.App. 1981); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 1356 & 1357 (2d ed. 1990) . . .<sup>31</sup>

<sup>30</sup> *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. App. 1992).

<sup>31</sup> *Id.*

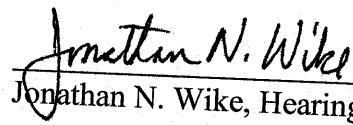


Indeed, as the Court of Appeals stated, “[d]ismissal under Tenn.R.Civ.P. 12.02(6) is warranted only when no set of facts will entitle the plaintiff to relief.”<sup>32</sup>

Upon review of the *Complaint* and the entire record in this matter, including the arguments of counsel at the September 4, 2002 Pre-Hearing Conference, the Hearing Officer finds that US LEC’s *Complaint* clearly states a claim upon which relief can be granted. The *Complaint* alleges sufficient facts in connection with causes of action which, at least on their face, are appropriately before the Authority. Therefore, the Hearing Officer denies EPB’s *Motion to Dismiss*. The Hearing Officer further determines that a contested case shall be convened to hear US LEC’s *Complaint* pursuant to Tenn. Code Ann. § 4-5-102(2) and Authority Rule 1220-1-2-.02.

**IT IS THEREFORE ORDERED THAT:**

1. The *Motion in Opposition to Commencement of a Contested Case or Motion to Dismiss* filed by the Electric Power Board of Chattanooga is denied.
2. A contested case proceeding is convened in this matter.

  
Jonathan N. Wike, Hearing Officer

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<sup>32</sup> *Id.*, citing *Pemberton v. American Distilled Spirits, Co.*, 664 S.W.2d 690, 691 (Tenn. 1984).